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Case Analysis: Scotch Whisky Association and ors. v. Golden Bottling

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ABSTRACT

It is not new to recognize a product through its geographical location. This is a major factor to grant the status of geographical indication to the product. This case of Scotch Whisky Association deals with the same issue of GI status of scotch. This is an important case that is related to the “Geographical Indications of Goods (Registration and Protection) Act, 1999” . The main sections in question are section 20(1), section 20(2), and section 67. The TRIPS Agreement has also been in question as well. The Scotch Whisky Association won the battle with Golden Bottling in the year 2006. The case went to the Delhi High Court . The Court upheld what the plaintiffs contended. According to the plaintiffs, the word “scot” can be traced back to a Scottish origin. Thus, usage of “scot” by Golden Bottling in its own brand can be treated as a violation of WTO rules. The concept of “geographical indication on goods” had been talked about in the judgement of this case. The defendant, Golden Bottling is a Jaipur-based company. According to Scotch Whisky Association , “Scotch whisky by law must be produced in Scotland and is protected as a geographical indication under WTO rules.”

SWA also revealed that a lot of Scottish whisky sold in India, are actually fake bottles. To bring the issue to notice, the plaintiffs had even referred to the “Scotch Whisky Act”, 1988 . The Court agreed that violation of intellectual property rights had been done by Golden Bottling. The article here deals with an overall analysis of this case. The facts, issues, arguments, findings, a brief analysis, have been mentioned in the article. The case was finally decided in the year 2006. Some other cases which are similar to the Scotch Whisky Association case, have also been mentioned in the article below. Some Indian products that have been granted the status of geographical indication, have also been mentioned briefly in this article below. A separate segment has been mentioned that talks specifically about the situation of GI in India.

Keywords: World Trade Organization, Geographical Indication, TRIPS Agreement.

I. INTRODUCTION

Patents, trademarks, geographical indications have become very important aspects these days. People have become more aware about the importance of protecting the intellectual property

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rights. This case of Scotch Whisky Association mostly deals with the GI tags (scotch whisky precisely). SWA had fought against a lot of defendants, especially in India to protect the GIs of the various products, most of which are indigenous to Scotland. The GI Act, 2003 gave an additional advantage to Scotch Whisky association to fight the case after enrolling scotch whisky as a GI under this Act. The facts and issues of this case are mentioned below in details. To understand this case, one needs to first understand the meaning of the basic concept that is behind this case, i.e., “geographical indication” or GI.

According to WIPO or World Intellectual Property Organization², GI can be defined as: “*a sign used on products that have a specific geographical origin and possess qualities or a reputation that are due to that origin. In order to function as a GI, a sign must identify a product as originating in a given place.*” The “Geographical Indications of Goods (Registration and Protection) Act”, 1999 is responsible for issuing GI tags in India. This protects an item or good with geographical indication, from getting used by an unauthorised party³. Some examples of GI tags within India are as follows: Darjeeling tea got the status of GI⁴ and the concerned state is West Bengal. The origin of the concept of “Darjeeling tea” can be traced back to as early as the 1830s. The whole procedure of achieving this status began back in 1983, and finally the status was granted in the year 2004⁵. In fact, Darjeeling tea is the first product in India, t ever receives a GI tag. Some other examples can include Solapur Chaddar (Maharashtra), Mysore silk (Karnataka), Salem fabric (Tamil Nadu), Pithora (Gujarat), Goan Khaje (Goa), Naga Cucumber (Nagaland), Sojat Mehndi (Rajasthan), and the list goes on⁶. TRIPS Agreement has the responsibility to grant GI tags. A GI tag needs to get renewed after every 10 years⁷.

Plaintiff 1 is the association itself based in UK, and plaintiffs 2 and 3 are the members of the association. The parties in this case are Scotch Whisky Association (SWA), which is a UK based company. The defendant is the Golden Bottling Limited, which is a Jaipur based company. SWA works for safeguarding interests of Scottish whisky at a global platform⁸. Scotch whisky has been a cultural product in Scotland, and the procedure of making it also

² “Geographical indications”, https://www.wipo.int/geo_indications/en/.

³ “Geographical Indication (GI) Tag: Meaning, Objectives, Examples and FAQs”, [May 8, 2020], <https://www.jagranjosh.com/general-knowledge/geographical-indication-gi-tag-meaning-objectives-and-faqs-1588846310-1>.

⁴ “Protecting Darjeeling Tea: The Tea from the Queen of the Hills”, <https://www.sourcetrace.com/blog/protecting-gi-darjeeling-tea/>.

⁵ Ibid.

⁶ “Geographical Indications (GI) tags in India – UPSC”, [November 27, 2021], <https://lotusarise.com/geographical-indications-gi-tags-in-india-upsc/>.

⁷ Ibid.

⁸ Shan Kohli, “Scotch Whisky GI Suit Settled: The Loss of a Landmark Ruling”, [April 8, 2016], <https://spicyip.com/2016/04/scotch-gi-suit-settled-the-loss-of-a-landmark-ruling.html>.

involves a lot of steps that are best done in Scotland. The main issue arose with usage of the name “Red Scot” by the defendants⁹. This is a very important case based on the concept of “geographical indication” (GI). The bench included M B Lokur to hear the case.

II. HISTORY OF THE TRIPS PROVISION ON GEOGRAPHICAL INDICATIONS

The Uruguay Round of the GATT trades began in 1986, absolutely when India's improvement system making method was at a watershed. Whenever India shipped off its colossal financial changes group in 1991, meaning an adjust in context in its system, the Uruguay Round trades were well under way, making room towards Marrakesh in 1994 and the underpinning of the WTO. India remained a careful and genuinely disengaged player during the hidden significant stretches of the Uruguay Round trades, given its long practice of inward-looking improvement framework and protectionist trade procedure framework. Overall, the importance of GI can be well understood from the case, and from a lot of other case studies.

(A) Facts of the case:

The plaintiffs wanted a permanent injunction that would restrict Golden Bottling from trading any liquor labelled by the name “Red Scot”. According to the plaintiffs, this gave the consumers a false connotation of Scottish whisky. SWA claimed that no product can even use the term “Scot” for naming its own products. In the year 2004, on April 22nd, the Defendant was issued summons and they were refrained from trading anymore whisky with the label of “Red Scot”. Even after the notice, the opposition party did not appear. Then in 2005, in the month of August, an affidavit was filed by SWA. The defendants did not deny the affidavit as well, thus it got admitted. As had been mentioned before, the plaintiffs highlighted the “Scotch Whisky Act”, 1988. The “Scotch Whisky Order” of 1990 defines the meaning of Scotch whisky under Rule 3. The same has been defined in the UK law before this order as well. It was back in 1909¹⁰. Thus, it can be concluded that the main problem in the case was related to the usage of the term “scot” due to issues of GI. In 2000, on 30th September a legal notice had been sent to the defendants to stop selling whiskies with the name “Red scot” on it. The defendants got the notice, but did not reply to it. Another notice was sent in 2001, and again there was no reply from the defendant’s side. Later, the plaintiffs thought that “Red Scot” was not being sold in the market anymore. Again in 2003, in the month of June, SWA found out that “Red Scot” was in the market again.

⁹ “India: Scotch Whisky ‘Order’ Prevails in India”, [July 6, 2006], <https://www.mondaq.com/india/trademark/40954/scotch-whisky-order-prevails-in-india>.

¹⁰ Timothy C. S. Dolan, “Scotch Whisky”, [2003], [Science Direct], <https://www.sciencedirect.com/topics/agricultural-and-biological-sciences/scotch-whisky>.

(B) Issue of the case:

The issue in this case was whether it is allowable for the plaintiffs to approach the Court in order to restrain the defendant from trading its goods as those which originate from Scotland or that it is “Scotch whisky.”

(C) Arguments:

Plaintiff's arguments- The plaintiff highlighted these rules and orders just to make it clear that even all the whiskies produced in Scotland itself, cannot be referred to as “Scotch Whisky”. As per them, scotch whisky is in itself a brand, and it is advertised as whisky manufactured in Scotland following specific procedures. The plaintiffs claimed that usage of the word “scot” gives a false impression to the consumers, who might mistakenly consider it as the original scotch whisky. The learned Counsel of the plaintiffs also referred to the WTO TRIPS agreement¹¹. He mentioned the following articles- Article 22 and Article 22.1. Section 20(1) of the Act¹² says the following that the counsel had referred to: “*it prohibits any person from instituting any proceedings to prevent or to recover damages for the infringement of an unregistered geographical indication.*” As a compensation for the “passing-off” done by the defendants, the plaintiffs demanded an amount of Rs. 5,00,000. The plaintiffs also cited a lot of cases that have been earlier decided by the Court, where the defendants had to compensate. The plaintiffs contended that since there was no presence of scotch in the products, it was a breach of the GI of scotch whisky in India¹³. They also were successful in proving that scotch whisky was basically the whisky that was specifically brewed in Scotland around 500 years back, using traditional procedures. Hence, any whisky or liquor manufactured in India, cannot be called a scotch, that too when scotch is already registered as a GI in India in the year 2009¹⁴. Therefore, Golden Bottling Ltd had breached the rules.

Defendant's arguments- The defendants denied receiving any notice/summons. The learned counsel of the defendant claimed that he only got to know about the situation through a Hindi newspaper “Nav Bharat Times” dated 24th April, 2006¹⁵. They also mentioned that the court had been misled by the plaintiff. Apparently, the affidavit did not even contain the complete address of the defendant or the signature that the recipient who was supposed to receive the

¹¹ “The Scotch Whisky Association, ... vs Golden Bottling Limited on 20 April, 2006”, <https://indiankanoon.org/doc/1122965/>.

¹² Section 20(1), “Geographical Indications of Goods (Registration and Protection) Act”, 1999.

¹³ “India: Delhi High Court Orders Only the Brews from Scotland to Be Called Scotch”, [April 11, 2016], <https://ssrana.in/articles/india-delhi-high-court-orders-only-the-brews-from-scotland-to-be-called-scotch/>.

¹⁴ Ibid.

¹⁵ “Scotch Whisky Association Ors. v. Golden Bottling Ltd.”, <https://www.casemine.com/judgement/in/56ea9362607dba371ebcab7a>.

affidavit¹⁶.

(D) Findings:

The hon'ble Court found out that the usage of the terms: "scot" or "scotch" on domestic whiskies leads to violation of copyright laws, that too at a global level¹⁷. As a result, the court ruled that the defendants have to pay compensation of around Rs. 8,10,000 to the Scotch Whisky Association "*in view of the well-settled law....and the necessity of preventing a violation of intellectual property rights of others...*" The judge of this case, M.B. Lokur also agreed that no domestic liquor manufacturer can use the abovementioned words in the marking of its own products¹⁸. Judge Lokur also mentioned that, "*I am satisfied that the domestic manufacturer is liable to be restrained from passing off its Red Scot whisky as a produce of Scotland*".

The Court also found out that a lot of similar cases had already been heard before, where the defendants were held responsible and became liable to compensate. Some of these cases are: "Time Incorporated v. Lokesh Srivastava and Anr."¹⁹, "Microsoft Corporation v. Yogesh Popat and Anr."²⁰ and "Cartier International B.V. v. Cartier Enterprises"²¹, which was decided on 22nd July, 2005.

The Court also referred to Section 67 of the Act²² that leads to empowerment of a Court to grant accounts of damages or profits.

The Court held that, "*In view of the well settled law laid down by this Court, and reiterating the necessity of preventing a violation of the intellectual property rights of parties, I think it would be appropriate if the damages as prayed for by the Plaintiffs to the extent of Rs. 5,00,000/- are granted. 28. Under the circumstances, the suit is decreed in the above terms. The Plaintiffs are entitled to the permanent injunction prayed for and also to damages to the extent of Rs. 5,00,000/-. The Plaintiffs will also be entitled to costs of Rs. 3,10,000/- which they say they have incurred in this litigation.*"

III. ANALYSIS

The issues with GI are not only limited to India. Scotch Whisky Association had made legal charges for usage of the term "GLEN" against a German liquor brand. The European Court of

¹⁶ Ibid.

¹⁷ "Court rules domestic whisky not Scotch", [April 24, 2006], <https://www.hindustantimes.com/india/court-rules-domestic-whisky-not-scotch/story-gtskruO2HdkTgoKqk93QuM.html>.

¹⁸ Ibid.

¹⁹ Time Incorporated v. Lokesh Srivastava and Anr., [2005] 30 PTC 3 Del.

²⁰ Microsoft Corporation v. Yogesh Popat and Anr., [2005] 30 PTC 245 Del.

²¹ Cartier International B.V. v. Cartier Enterprises, CS (OS) No. 1208/2003.

²² Section 67, "Geographical Indications of Goods (Registration and Protection) Act", 1999.

Justice aka the ECJ highlighted the fact that the term “GLEN” should make consumers think of Scotch whisky specifically, and mere association with Scotland would not suffice²³. Later it was decided by the court in Hamburg, that usage of “GLEN” on whiskies produced in Germany could be misleading for the consumers. After SWA won this case, a substantial debate arose in order to decide the range till which usage of suggestive names could be allowed without violating GI rights²⁴.

SWA had filed legal cases against a lot of brands in India in order to safeguard the geographical indications and have won in a lot of them as well. In the year 2003, the GI Act was finally enacted in India. SWA took the chance, and it enrolled “scotch whisky” under this Act as a GI tag²⁵. According to the TRIPS Agreement, individuals need to give the legitimate aid to closely involved individuals to forestall any utilization that would deliver it a demonstration of uncalled for rivalry under “Article 10bis” of the Paris Convention. This applies to the utilization of GIs for wines and spirits not beginning in the space showed.

The importance of GI tags has also been made clear in the article above. These tags prevent unauthorized usage and exports of such products. As already been mentioned before “Geographical Indications of Goods (Registration & Protection) Act”, 1999 issues GI tags in India. “Section 21” of this Act, talks about the right to file legal charges in case any infringement takes place. When it comes to liquors and wines, “Article 23” of TRIPS agreement gives extra security and protection to the aforementioned substances²⁶. The GI Act, 1999 is not very firm yet. The grounds and rules do not have a very strong foundation.

India is a significant developing business sector for imported Scottish whisky, however the SWA, in a media discharge, appraises the quantity of phony containers available for use to be actually that high of certifiable items. A contributor to the issue is the import obligation collected on Scotch- between 212% to 525% of the landed cost. The European Commission is researching India's import system for EU spirits and wine²⁷. SWA also said that, “*Scotch whisky by law must be produced in Scotland and is protected as a geographical indication under WTO rules... In this case, use of the word 'Scot' on the bottle label was an attempt to mislead consumers into thinking they were buying Scotch whisky rather than locally produced spirit.*”

²³ Rajendra Kumar, “GI Protection and enforcement in India”, [May 12, 2020], https://www.origin-gi.com/web_articles/india-membersvoice-gi-protection-and-enforcement-in-india-by-rajendra-kumar-counsel-senior-advisor-k-s-partners-intellectual-property-attorneys/.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Karan Singh, “Importance of Geographical Indication Tags in India – An Overview”, [December 17, 2021], <https://swaritadvisors.com/blog/importance-of-geographical-indication-tags-in-india/>.

²⁷ Supra note 3.

The importance of GI tags, and how issues can come up if one is not careful enough while using a name/term on their products, have been very clearly proved in this case.

While talking about issues where IP rights are getting violated in a case, a major reason behind that could be unawareness. Since, protection of IP rights is relatively a new notion, especially in a developing nation like India. Due to this unawareness, the violations often happen at a large number. While analysing this case, it could be very clear that it is important to provide protection to products with a GI tag to it. The requirements to gain a GI tag should also be uniform, i.e., an even system should be established. The next chapter would describe the current status of rules regarding geographical indication in India.

IV. STATUS OF GI IN INDIA

As it might be very well-known already, the condition of the rules regarding geographical indication in India needs a lot of improvement even now. Geographical indications or GI tags have become an important of the cultural heritage of a country. Hence, they need to be protected at all costs²⁸. Before the GI act, India did not have any such rules and regulations to regulate the usage and protection of geographical indications²⁹. The present geographical indication in India is governed by the “Geographical Indication of Goods (Registration & Protection) Act”, 1999 and the “Rules on Geographical Indication of Goods (Registration and Protection)”, 2002. “Article 22(1)” of TRIPS defines geographical indication as follows: “*indications which identify a good as originating in the territory of a member or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin*”³⁰.

Sections 38 to 44 of the Act has spoken about the punishments of violating the laws and regulations. These are the criminal remedies, along with these, there are civil remedies as well. Civil remedies primarily include “injunctions”, and “damages or accounts of profits”. Experts say that criminal remedies are more effective as compared to civil remedies. This is because judicial remedies can get disposed of easily, as compared to civil remedies, thus making them more preferable options.

Given its business potential, real protection of GI acknowledges enormous significance. Without sensible legitimate protection, the competitors who don't have any real honours on the

²⁸ “Geographical Indications of India”, <https://www.ibef.org/giofindia>.

²⁹ Janhavi Sitaram Dudam, “An Overview on the kinds of Relief provided for Violation of Geographical Indication In India”, [March 27, 2020], https://blog.ipleaders.in/reliefs-provided-for-violation-of-geographical-indication-in-india/#Analysis_of_Geographical_Indication_Act.

³⁰ Ibid.

GI could ride free on its standing. Such irrational key strategies achieve loss of pay for the true right-holders of the GI and moreover misleads purchasers. Furthermore, such practices may at last hamper the liberality and reputation related with the GI³¹.

V. CONCLUSION

Products that have a geographical indication should definitely be given the deserved protection. GI tags are very necessary and their protection is necessary as well. The motivation behind the law concerning the equivalent can be expressed in three central matters: to limit unapproved substances from dishonestly marking items as though they were of geographic importance, to shield shoppers from being cheated, and to advance monetary flourishing dealers holding geographical signs. While the assurance of geological signs in India through the customary regulation cure of passing-off has yielded an abundance of legal assessment consistent with the law somewhere else, the extent of legal security under the GI Act is as yet in an undeveloped state. India has around 370 GI tags (as of 2019)³², but the situation and laws regarding it are not very firm yet.

Just like patents, and trademarks, GI tags also have different regulations in different countries. Two essential obligations are present on WTO part legislatures connecting with GIs in the TRIPS understanding³³. The central government has watchfulness to conclude which items ought to be agreed more elevated levels of security. This approach has purposely been taken by the drafters of the Indian Act determined to give severe insurance as ensured under the TRIPS Agreement to GI of Indian beginning.

The overall situation of GI status in India particularly, had also been mentioned in the article. This case had been a very important landmark in the concept of protection of intellectual property rights. India still has a long way to go to come up with a more solid system in order to protect the GI status of products. It can be concluded from the above article that India is a land of varied cultural heritage.

But not all product/ invention/ discovery comes under the purview of geographical indications under “Section 2(e)” of the Act. Lot of factors are to be considered before granting GI status to any item. An important GI tag related case was when the Tea Board filed legal charges against

³¹ Dr Sudhir Ravindran & Ms. Arya Mathew, “The Protection of Geographical Indication in India – Case Study on Darjeeling Tea”, <https://www.altacit.com/wp-content/uploads/2021/09/The-Protection-of-Geographical-Indication-in-India-Case-Study-on-Darjeeling-Tea.pdf>.

³² Supra note 17.

³³ Ritika Gupta, “Protection of Geographical Indication and Its Judicial Findings”, <https://www.legalserviceindia.com/legal/article-2405-protection-of-geographical-indication-and-its-judicial-findings.html>.

ITC for using the trademark of Darjeeling lounge. It was pleaded by them that usage of 'Darjeeling' was to be considered as plain unfair competition on ITC's end. Just like SWA, The Tea Board also claimed that this had created some confusions amongst the consumers. This is one of the most used arguments in these cases. In this case, ITC defended themselves by saying that "Darjeeling" is merely the name of a place. One can find a lot of other items there, and not just tea. Hence, usage of 'Darjeeling' does not really violate the GI rules. Here the Court decided that the protection could be granted only to tea, and not to everything else including the lounge facilities. Hence, this case had made it clear that not every other factor comes under the purview of protection of geographical indications. This case between ITC and the Tea Board. There are a lot of factors that should be considered, since providing such protection can hamper the trading of the other party. Thus, the protection cannot be provided based on loose allegations only.

Along with Darjeeling tea, Kolhapuri chappals as well as Tirupati laddus had also been granted GI status.

In India, the matter related to protecting GIs, had been brought into attention primarily due to the TRIPS agreement. In India, a "sue generis" system had been established in the year 1999 to deal with geographical indications. GIs offer Indian makers a chance to perceive and advertise a superior item under their elite control.

The case had shown the importance of GIs and the effect of violation of the GI rules. SWA had contested a lot of legal cases against many brands in countries like India and Germany, in order to safeguard the interests of liquor, which were mostly from Scotland. Geographical indications improve the diversity of an area, and they need to be protected at all costs; be it in India or in some other part of the world. Not a lot of landmark cases were present in India which are related to geographical indications. Hence, this case became a landmark case in this field. Lately in the year 2015, SWA filed another case against a lot of distilleries including Oasis Distilleries as well as Malbros International Private Limited. The charge was that these brand had been using the term "Scotch Whisky" and on the labels of their products. In this case, the parties had a settlement and as a result SWA withdrew the complaints.

Actually, a brand or party can use a product which has been given the status of geographical indication. In such a scenario, the real place of origin, should be mentioned on the product. This would prevent any violation of the GI rules. Although, technically this is not a violation, it has been misused a lot, especially in Europe.

Once a geographical indication is accepted in a country, the party should proceed in achieving an international acceptance. When studied carefully, most GIs are provided to items that belong

to the following fields including agriculture, crafts, fisheries, etc.

As had been mentioned already, liquors and wines get extra security under TRIPS agreement. This can be a major backlog, because different products get different treatment under this agreement. This has created some anomalies and irregularities too. Hence, amendments should be made in order to improve the situation.

The GI status situation in India needs immediate attention. Not only GI status, but protection of intellectual property rights has to be taken care of. The concept of intellectual property rights is comparatively a newer concept, and needs attention and improvements.

At the end, it can be concluded that the article is not only about analysing the case of Scotch Whisky Association and Golden Bottling Limited, but also analysing the notion of intellectual property rights, geographical indications, etc. This case would come into the frame whenever the issue of GI tag violations takes place. It can also be established that more awareness and caution is required in these situations involving intellectual properties. Once more awareness is confirmed, these issues can be avoided.

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